Oregon Business Lawyer

Oregon State Bar Business Law Section Newsletter • September 2020

May the Force Majeure Be With You: Examining Emerging Trends in Contract Disputes Related to COVID-19

By Matthew Yium and Thomas Scott, Foster Garvey, PC

In March of 2020, Oregonians were confronted with the first and, it is hoped only, global pandemic of our lifetimes arising out of the spread of COVID-19. In response, Oregon's governor, Kate Brown, issued unprecedented emergency orders mandating the closure of public schools, the partial closure of restaurants and bars, and the effective closure of many other businesses throughout the state. Nearly half a year later, many of these restrictions continue with an end not yet in sight. These and other measures enacted by local, state, and the federal governments have prompted lawyers and their clients to re-examine contractual provisions and common law defenses that may be implicated by COVID-19-related events. This article discusses a contractual provision gaining particular attention during the pandemic: the force majeure clause, which is often found in leases and other types of contracts. The article also examines common-law defenses, which may excuse a party's performance on a contract if such excuse is not otherwise foreclosed by the terms of the contract.

In this Issue

Articles

News

Force Majeure Provisions

"Force majeure" translates literally from French as "superior force." Force majeure clauses generally provide that a party who has been unable to perform under a contract due to the occurrence of certain uncontrollable events may suspend, delay, or avoid performance under a contract without liability.[1]

Typical force majeure clauses enumerate certain events that are deemed "force majeure events," which often include strikes, acts of war or terrorism, civil disturbances, natural disasters, and other "acts of God." When a particular event is not specifically enumerated, a party will have to rely on a "catch-all provision," which typically says something along the lines of "other events that could not have been anticipated and are outside a party's control." Since pandemics and epidemics are not commonly listed as force majeure events, they would need to fall within the catch-all provision to be eligible for a claim of force majeure.

With limited guidance from Oregon courts regarding interpretation and applicability of force majeure clauses, the exact wording of the contract is crucial. Thus, contract negotiations in the COVID-19 era are seeing heightened focus on force majeure clauses. Where the force majeure clause was once treated as a short and simple "boilerplate" paragraph that parties may have glossed over in favor of seemingly more important provisions, these clauses have lately blossomed into long and robust paragraphs, with parties considering (and fiercely negotiating) questions such as:

- What requirements must be met to claim a force majeure delay (e.g., contemporaneous notice requirements)?
- Should allowable force majeure delays be capped (e.g., 30 days)?

Continued on page 2

Force Majeur

Continued from page 1

Matt Yium practices in the area of litigation, trials, and arbitrations involving commercial leases, real estate, and other commercial contract disputes.

Tom Scott's practice focuses on real estate and corporate transactions, including commercial leases and purchase and sale agreements.

Both attorneys are based in the Portland office of Foster Garvey P.C.

- What, if any, provisions of the contract should be exempt from delay for force majeure (e.g., payment of rent, the exercise of self-help rights, or expiration of due diligence periods)?
- Are both parties subject to the benefits of a force majeure claim (e.g., both landlord and tenant?)

Another topic for negotiation is whether COVID-19 should be designated as a force majeure event at all. While many lawyers have begun specifically naming COVID-19 as an acceptable force majeure event, it bears asking whether COVID-19 is truly an unforeseen event out of the parties' control, now that everyone is aware of the slowdowns it has created (and contract deadlines have presumably been negotiated with those slowdowns in mind). For example, a seller of a commercial property might agree to give a prospective buyer a longer permit approval period knowing that local government offices are understaffed and operating on reduced schedules. Can the prospective buyer then rightfully invoke the force majeure clause to obtain an extension of the permit approval period if it misses the (longer than normal) deadline because the county planning department was running behind? It might, depending on how the force majeure clause was drafted, and hence the need for increased scrutiny.

While parties are giving much greater attention to force majeure clauses in new contracts in the COVID-19 era, it does not solve the problem of enforcing old contracts (such as real property leases) where force majeure rights are not crystal clear. The governor's moratorium on residential and commercial evictions (Order 20-13), and the subsequent passage of Oregon House Bill 4213,[2] have provided temporary remedies for parties concerned about making rent payments and trying to guess how a court might rule. But many parties have taken the proactive approach of trying to find business solutions, rather than legal ones. Common trends for real property leases during the COVID-19 era include:

- Full or partial abatement of rent payments
- Deferral of rent payments until a specified date, at which time the deferred amount is due in full
- Deferral of rent payments, with the deferred amount amortized over all or a portion of the remaining lease term
- Incentives for timely paying rent
- Waiver of continuous operations requirements or other clauses that require physical presence at the premises
- Required earmarking of PPP loan proceeds for payment or rent

However, in the absence of a perfectly drafted force majeure provision, and failing the ability to find a mutually acceptable business solution, parties may be forced to litigate.

Common-Law Defenses

When considering whether to litigate a force majeure or other contractual provision, it is important to remember that Oregon courts will look first and foremost at the plain language of the contract. As a result, whether you are seeking to enforce the other party's performance on a contract or seeking to be excused from performing under a contract, you should closely examine all applicable provisions of the contract.

If not foreclosed by the terms of the contract, a party may be able to assert certain common-law defenses available in Oregon if he or she is seeking to be excused from performance. Some common-law defenses that are likely to be raised as a result of events related to COVID-19 include frustration of purpose, impossibility, and impracticability—each of which is discussed in more detail below. Each of these defenses may excuse a party's non-performance and may provide a means of avoiding liability for damages that result from breach of the contract.

Generally, common-law defenses are available only for unexpected occurrences not contemplated by the parties at the time the contract was created and that are not otherwise addressed by provisions in the contract.[3] The breaching party bears the burden of proving these defenses in court. The breaching party may seek to avoid liability for economic damages caused by the breach or, in some circumstances, it may wish to go one step further and ask the court for a remedy consistent with rescission, meaning that it would ask the court to put the parties back into the position they were in before entering the contract.

Impossibility/Impracticability

In Oregon, an impossibility defense can arise when, after entering a contract, certain events that a contracting party had "no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the contract impossible."[4]

Continued on page 3

Force Majeur *Continued from page 2*

Some contracts may excuse performance based upon impossibility of performance resulting from an "act of God." In the absence of a definition of an "act of God" in the contract, Oregon courts have defined such events as a natural occurrence of "extraordinary" and "unprecedented proportions… not foreshadowed by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight."[5] Other examples of circumstances giving rise to an impossibility defense include fire, outbreak of war, or the death of the promisor.[6]

Related to impossibility, impracticability may exist where an unexpected difficulty or expense may approach such an extreme that a practical impossibility exists.[7] Impracticability and impossibility defenses usually require a party to show that the hardship of performance is so extreme as to be outside any reasonable contemplation of the parties.[8] Unforeseen circumstances that cause performance to be more expensive (and commercially less profitable) than anticipated have often not proven sufficient to excuse performance under an impossibility or impracticability defense.[9] For that reason, attorneys seeking to rely upon COVID-19-related economic hardships (such as those resulting from the recession or business disruption) to support an impossibility or impracticability defense will need to look for ways to distinguish their clients' case from prior caselaw.

Frustration of Purpose

Unlike impossibility and impracticability defenses, the doctrine of frustration of purpose does not depend upon an impediment to performance. Rather, the doctrine "deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract. It is distinct from the problem of impracticability… because there is no impediment to performance by either party."[10] Thus, attorneys representing clients who theoretically could perform their obligations under a contract but for COVID-19-related economic hardships, frustration of purpose may prove a better defense than impossibility or impracticability. Oregon courts have recognized the doctrine of frustration of purpose to excuse performance on a contract when the overall purpose of the contract has been "substantially frustrated" by the occurrence of an unexpected event "the non-occurrence of which was a basic assumption on which the contract was made."[11] Although the frustration of purpose defense has not often proved successful in Oregon's appellate courts, the unprecedented nature of the COVID-19 events may change that trend.

Conclusion

In summary, if you are seeking to enforce or avoid a contractual obligation in Oregon, you should carefully look for any provisions (including a force majeure clause) that address future unexpected events such as an "act of God" or unprecedented governmental actions. If the contract does not provide otherwise, the extraordinary events related to COVID-19 may implicate common law defenses excusing a party's performance or even resulting in termination of the contract entirely. ◆

Endnotes

1. *Black's Law Dictionary* defines a force majeure clause as a "contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled." *Black's Law Dictionary* (9th ed. 2009).
2. HB 4213 is the Oregon House Bill passed on June 26, 2020 which codified the eviction moratorium (originally imposed by Governor's Order 20-13 through June 2020) and, among other things, extended the moratorium for non-payment of residential and commercial rents through September 30, 2020.
3. *Savage v. Peter Kiewit Sons'*, 249 Or 147, 152 (1968); see also *Rose City Transit Co. v. City of Portland*, 18 Or App 369, 423 (1974), modified, 271 Or 588 (1975).
4. *Savage*, 249 Or at 152 (citing Restatement of Contracts § 457 (1932)).
5. *Schweiger v. Solbec*k, 191 Or 454, 464 (1951) (citations omitted); see also *Nw. Mut. Ins. Co. v. Peterson*, 280 Or 773, 776–77 (1977).
6. See, e.g., *Eggen v. Wetterborg*, 193 Or 145, 153, 237 P2d 970 (1951) (applying impossibility defense where accidental fire destroyed buildings that were subject to a lease-making performance under lease impossible).
7. Id.
8. Id.
9. Id.; see also *Savage*, 249 Or at 153 ("A mere showing of commercial unprofitability, without more, will not excuse the performance of a contract.").
10. Restatement (Second) of Contracts § 265 (1981).
11. Restatement (Second) of Contracts § 265; see also *Smith Tug v. Columbia–Pac. Towing*, 250 Or 612, 641 (1968) and *Wah Chang v. Pacificorp*, 212 Or App 14 (2007).

PPP Loan Forgiveness: The Basics

By Shanna Knight, Lewis & Clark Law School Small Business Legal Clinic, and Darin D. Honn, Sussman Shank LLP

Shanna Knight is a staff attorney at the Small Business Legal Clinic at the Lewis & Clark Law School. She provides low-income new and emerging small businesses with transactional legal work in Oregon. Lately that has included helping clients navigate the Covid-19 crisis, including PPP loans. Shanna also works in the Clinic's Rural Program, supporting small businesses, and especially Native entrepreneurs, in small towns and cities across the state.

Darin D. Honn is a partner at Sussman Shank LLP in Portland, Oregon, and his practice includes acting as outside general counsel for a myriad of businesses, as well as providing businesses assistance in corporate, real estate, land use and financing (including PPP loan issues) matters.

This article provides a brief background on the Paycheck Protection Program (PPP) and its fairly recent changes, and a high-level overview of what uses of loan proceeds are forgivable and how a recipient should apply for loan forgiveness. Ultimately, each loan recipient should recognize:

- The PPP loan was meant to support a business's payroll, so payroll expenditures are the primary focus for forgiveness;
- a business's loan and forgiveness terms will be affected by the date the funds are disbursed; and
- the best way to plan for forgiveness and the accompanying paperwork is to read the loan application and forgiveness application and use proceeds in accordance with those applications.

Background

A review of the PPP loan requirements/application[1] will assist a recipient in determination of what uses of funds are forgivable, and how to prioritize its use of funds. The PPP was initially established by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)[2] on March 27, 2020. The purpose of the PPP, with an emphasis on paycheck, is to provide funds to small businesses—those who have fewer than 500 employees (with limited exceptions)—to maintain their payroll through the economic downturn caused by the COVID pandemic. It therefore follows that payroll costs are the primary focus of the PPP loan program.

Since the law was passed, there has been substantial confusion and awkward stops and starts, not the least of which was because the Small Business Administration (SBA) was creating its first temporary rules[3] to implement the PPP at the very same time as banks were trying to process the first loan applications. What many people do not know, however, is that on June 5, 2020 Congress passed the Paycheck Protection Program Flexibility Act of 2020[4] (PPP Flexibility Act) to modify the PPP's loan-forgiveness provisions. This additional law has extended forgiveness to a greater percentage of necessary business expenditures and allowed for repayment over a greater period of time. While most of the PPP Flexibility Act's provisions apply to all PPP recipients, there are some differences (discussed below) for loans disbursed before and after the date of enactment of the PPP Flexibility Act (June 5, 2020).

Forgiveness, Generally

As you would expect, "payroll expenses" are forgivable expenditures, as long as they meet certain requirements. For example, forgiveness of payroll is limited to $100,000 annual compensation per employee, prorated to the applicable expense period. A recipient may need to run additional calculations if the business was not able to re-hire full-time employees and qualify for the exemptions to that requirement. Other forgivable expenditures are expressly limited to commercial rent, utilities, and mortgage interest—not mortgage principal—payments. Initially, in order to qualify for forgiveness, applicants were required to spend at least 75% of their PPP funds on eligible payroll expenses, and no more than 25% on the other eligible expenses of rent, utilities, and mortgage interest. However, the PPP Flexibility Act changed those percentages, and the law now requires at least 60% of the loan proceeds to be spent on eligible payroll, and allows up to 40% to be spent on the other eligible expenses.

As mentioned above, depending on whether a borrower received PPP loan proceeds before or after June 5, 2020, there are differences in the range of dates borrowers can apply PPP funds, and different loan maturity dates. For example, if a business received its funds before Congress passed the PPP Flexibility Act, it has the choice of whether to apply its PPP funds to eight weeks of expenses after the funds are disbursed or to expenses incurred for 24 weeks after the funds were disbursed. This date range provides more flexibility in how businesses spend their funds, so they can ensure they only spend the funds on eligible expenses. A small business that spends all of its funds on payroll may opt for the eight-week date range in order to take advantage of the greater simplicity of managing paperwork for an eight-week period, and file its loan forgiveness application before a substantial number of other businesses that will likely be applying for forgiveness later in the year. On the other hand, a larger business may want to apply its funds judiciously over time because the eight-week period may not allow it to meet the requirements for maximum forgiveness. If a business received its funds after June 5, 2020, the 24-week period for use of loan proceeds applies. In addition, businesses that received

Continued on page 5

PPP funds prior to June 5 have a loan maturity date of two years. However, the terms of the PPP Flexibility Act allow for these borrowers to take advantage of the longer five-year maturity, if they can mutually agree to it with their lenders. A business that received its PPP funds on or after June 5, 2020 will automatically have a five-year maturity, and need not worry about renegotiating any terms with its lender in order to access the better terms.

The Forgiveness Application[5]

The SBA has created applications for forgiveness that helpfully lay out needed equations, documentation requirements, and related matters. As a practical matter, borrowers are not going to return these applications to the SBA, but rather to their lenders, and it is likely that the lenders will have an online form that provides some version of the questions on the SBA applications. Still, it is very useful to review the form SBA application ahead of time and have the paperwork ready to complete the online form. The applicant should note which documents must be submitted and which documents must be kept for four years. It is also helpful to have these materials assembled and easily accessible in the event that the application is ever audited. The SBA has indicated that it is less concerned with auditing the businesses that received less than $2 million in funds.[6] That being said, however, the borrower needs to complete the application in good faith and have it well documented.

At the time this article was written, there were two SBA application forms: a standard one and an EZ form. The instructions are available as separate documents, so the applicant should ensure it possesses such instructions as well as the application. The EZ form is only available to applicants if they meet certain requirements—such as being a "small business" consisting of a self-employed individual with no employees—or if they meet a mix of requirements that includes not lowering wages by a certain percent, rehiring, and/or being closed. In any case, reading and complying with the requirements of the different forms ahead of spending the PPP funds will help to ensure the borrower can obtain loan forgiveness to the greatest extent possible.◆

Endnotes

1. Small Business Administration, Paycheck Protection Program Borrower Application Form, (June 24, 2020), https://www.sba.gov/document/sba-form-2483-paycheck-protection-program-borrower-application-form.
2. Pub. L. No. 116-136 (2020).
3. See *Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Fed. Reg. 20,811 (Apr. 15, 2020) (to be codified at 13 C.F.R. Part 120). Note: there have been many additional temporary rules since then. To see a comprehensive list and links to the Federal Register, visit https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses and scroll down to Program Rules.
4. Pub. L. No. 116-142 (2020).
5. Note: The authors recommend turning to the SBA site for the Paycheck Protection Program, https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program, for the links to the Forgiveness Applications, their Instructions, and the Forgiveness FAQ, since they frequently change.
6. Small Business Administration, Frequently Asked Questions for Lenders and Borrowers participating in the Paycheck Protection Program (PPP) (June 25, 2020), https://www.sba.gov/sites/default/files/2020-06/Paycheck-Protection-Program-Frequently-Asked-Questions%20062520-508.pdf (See Question 46).

Federal Agencies Signal Changes to CBD Regulation and Enforcement

By Max Yoklic, Stoel Rives LLP

Max Yoklic is an associate in the environment, land use, and natural resources practice group at Stoel Rives LLP. His practice emphasizes permitting and regulatory compliance, local land use, renewable energy facility siting, and agricultural transactions.

Federal regulation of products containing hemp-derived cannabidiol (CBD) is evolving rapidly. New interim rulemaking and draft guidance issued by the U.S. Food and Drug Administration (FDA) and the U.S. Drug Enforcement Administration (DEA) indicate that federal agencies may be preparing to increase regulatory enforcement of CBD manufacturing and the sale of CBD products in conjunction with a growing national market and emerging regulatory issues. For example, although the FDA has stated that adding CBD to food and dietary supplements is illegal, enforcement has concentrated narrowly on CBD products marketed using claims of health benefits. The DEA has largely avoided enforcement but has taken note that market-level FDA-tested CBD products inaccurately state the content of both CBD and delta-9 tetrahydrocannabinol (THC), which has also been the subject in at least one class-action lawsuit. See *Pfister v. Charlotte's Web Holdings Inc.*, No. 1:20-cv-00418 (N.D. Ill. 2020). The agencies' proposed regulations and guidance may signal a shift in enforcement priority from marketing to manufacturing, production, sale, and labeling. If finalized, the regulations and guidance could have a significant impact on the CBD industry from farm to shelf, potentially increasing the regulatory burden on companies that produce CBD or products containing CBD.

Prior to the Agricultural Improvement Act of 2018, Public Law No. 115-334 (2018 Farm Bill), CBD was listed as a Schedule I controlled substance under the Controlled Substances Act (CSA). 21 U.S.C. § 801 et seq. The 2018 Farm Bill removed "hemp," defined as the plant Cannabis Sativa L., including all derivatives, extracts, and cannabinoids, containing no more than 0.3% THC on a dry-weight basis, from schedule I of the CSA. See 21 U.S.C. § 802(16); 7 U.S.C. § 1639o(1).

Federal agencies began adopting CBD regulations pursuant to the definition of hemp in the 2018 Farm Bill. The U.S. Department of Agriculture (USDA), which regulates hemp crop production and harvest, issued an interim final rule, effective through October 31, 2021 or until a final rule is published that requires hemp to be tested for THC content 15 days pre-harvest. 84 Fed. Reg. 58522 (Oct. 31, 2019).

The FDA has regulatory authority over the manufacturing and sale of drugs, cosmetics, dietary supplements, and food and beverage products containing CBD. However, there is no federal requirement to test for THC during the processing of hemp into CBD, even though the legality of CBD products depends on whether the THC content exceeds the 0.3% threshold.

In March 2020, the FDA published a congressional progress report on development of a policy for enforcement discretion and the process for evaluating CBD for use in products regulated by the agency. In the report, the FDA took the position that adding CBD to human or animal food, or selling CBD as a dietary supplement, violates provisions of the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 321(ff)(3)(B), 331(II). Despite that position, the FDA has focused enforcement efforts on products that pose the greatest risk to consumers, targeting products marketed with claims of therapeutic or drug benefits without having undergone the drug approval process. By contrast, the FDA has generally ignored consumable CBD products that do not make unfounded health claims.

In July 2020, the FDA sent a draft Cannabidiol Enforcement Policy to the Office of Budget and Management. The guidance is not yet publicly available. The March 2020 report stated that the enforcement policy will be "risk-based" and will clarify the factors the FDA will consider when prioritizing enforcement decisions. Given the FDA's fixation on high-risk products, the policy could continue to direct enforcement against products marketed with unproven health benefits. On the other hand, the policy could redirect enforcement efforts to testing and ensuring that CBD products qualify as hemp and remain under the 0.3% THC threshold. Until the document is released, the effect on the CBD industry remains unknown.

In addition to enforcement at the consumer level, the FDA also issued a draft guidance document in July titled *Cannabis and Cannabis-Derived Compounds: Quality Considerations for Clinical Research* that could affect enforcement at the manufacturing level. Although the draft guidance relates to clinical research

Continued on page 7

Oregon's hemp agricultural market has experienced remarkable growth since the 2018 Farm Bill, with more than 64,142 farmed acres in 2019.

of cannabis-based drug development, it states that intermediates or accumulated by-products that are generated during the CBD manufacturing process that exceed the 0.3% THC threshold may not qualify as "hemp" under the 2018 Farm Bill. Practically, that means that materials produced during CBD processing that contain 0.3% THC or more are controlled substances under the CSA even if the final product is diluted below the threshold. The FDA recommended that manufacturers consult with the DEA to determine whether intermediate materials are hemp, and therefore legal, or are illegal controlled substances.

It may come as no surprise then that the DEA released an interim rule in August that states that while materials with less than 0.3% THC on a dry-weight basis are hemp and are not controlled under the CSA, intermediates or by-products that contain greater than 0.3% THC, even if the starting and final materials meet the definition of hemp, may be considered a Schedule I controlled substance. 85 Fed. Reg. 51639 (Aug. 20, 2020). That rule follows the FDA's interpretation that CBD processors that extract CBD from raw hemp plants and, in the process, create a material that exceeds the 0.3% threshold, would be in possession of a Schedule I controlled substance. These proposed rules and guidance demonstrate that federal agencies are cognizant of the market issues, including lack of testing and inaccurate labeling, and the perceived need for increased enforcement and regulation. At the state level, federal policy can influence state decision-making, as well as local enforcement of federal regulations.

Oregon's hemp agricultural market has experienced remarkable growth since the 2018 Farm Bill, with more than 64,142 farmed acres in 2019. Oregon allows hemp production and sale of CBD products intended for human consumption, including food, beverages, dietary supplements, and smokables containing CBD with less than 0.3% THC (among other requirements). See ORS 571.260 et seq.

Oregon law requires testing both pre-harvest and before retail sale, but as with federal regulations, testing is not required during processing.

The Oregon Department of Agriculture (ODA) initiated a boots-on-the-ground enforcement program in July 2020 to ensure compliance with the state hemp program, focusing on documentation, licensing, and complaints. However, the ODA is taking an educational approach by issuing letters of advisement that put regulated entities on notice of noncompliance.

The new federal materials reveal that federal agencies are interested in CBD and could exercise jurisdiction over Oregon's regulated community, even though the DEA has stated that CBD is not the agency's top priority. A shift in federal enforcement focus to CBD intermediates would affect Oregon companies by requiring changes in testing practices, and perhaps even CBD manufacturing processes, to ensure that products remain below the 0.3% threshold at all stages of production. In addition, Oregon currently requires testing 28-days pre-harvest, because its hemp program operates under the 2014 Farm Bill. The USDA's new 15-day pre-harvest testing standard increases the probability of failing a potency test, as THC content continually increases until harvest. Therefore, Oregon companies and lawyers working on commercial hemp agreements should plan for the contingency that crops that have historically complied with the 0.3% threshold might exceed the threshold under the new standard.

Submitting comments on the interim final rules or supporting federal lobbying efforts to clarify the legality of CBD products are immediate actions that companies that produce, manufacture, or sell CBD products, or their counsel, may take regarding the federal changes.

To the extent that the proposed rules and guidance conflict with the language or purpose of the 2018 Farm Bill to remove hemp derivatives and extracts from the CSA, the regulated industry might challenge the agencies' position. Until the rules are finalized, counsel should be aware of the developing regulatory requirements, agency interpretations, and the potential impacts on the CBD industry. ◆

Remote Online Notarization Comes to Oregon, For a While

By Mark B. Comstock, Commissioner, Oregon Law Commission and Comstock Law & Consulting PC

Mark Comstock chaired the Oregon Law Commission work group that brought together title company lawyers, real estate lawyers, estate planning lawyers, the Oregon Secretary of State Notary Director, and representatives of the Oregon State Bar, Oregon Bankers Association, Oregon Credit Union League, Oregon Mortgage Bankers, Oregon County Clerks, and the Oregon Judicial Department to consider a National Conference on Uniform State Laws proposal for amendments to the Revised Uniform Laws on Notarial Acts adopted in Oregon in 2013.

On June 30, 2020, when Governor Kate Brown signed enrolled House Bill 4212A, remote online notarization (RON) became an authorized method of notarizing documents in Oregon, at least until June 30, 2021. The limited duration of remote online notarization is a function of the emergency nature of the adoption as part of COVID-19 measures by the First Special Session of the 2020 Oregon Legislature.

What the RON legislation provides

At their core, sections 19 through 32 of HB 4212A amend the current physical presence requirements of ORS 194.235, if certain conditions exist. Those conditions include:

- The notary must be registered with the Oregon Secretary of State as an Oregon notary who has the communication technology to provide simultaneous audio and visual communication between the notary and the remotely located signing individual.
- The notary has satisfactory evidence of the identity of the signer by knowledge, verification of a credible witness appearing before the notary, or a method of satisfactory evidence of the identity of the signor using at least two different types of identity proofing.
- The notary, or their agent, has the ability to make and securely store an audiovisual record of the notarial act for a minimum of 10 years.
- The notary is reasonably able to confirm that the record to be notarized is the same record as signed by the remote signer.

As always, the devil is in the details

The definitions are crucial, as are the forms of certification in the legislation. The most important definitions in the legislation are "communications technology" and "identity proofing."

Communications technology means an electronic device or process that allows a notary located in Oregon and a remotely located individual to communicate simultaneously by sight and sound, and when necessary and consistent with other applicable law, facilitates communication with a remotely located individual who has a visual, hearing, or speech impairment.

Identity proofing means a process or service by which a third person provides the notary with a means to verify the identity of a remotely located individual by a review of personal information from public or private data sources.

In practice, identity proofing occurs when the signer satisfactorily answers a series of multiple-choice questions relevant to the individual's history, the answers to which are likely only known in combination by the identified signer. This is similar to the process used for an online credit report request verification. The identity proofing is not part of the recorded audiovisual record of the notarial act, which is maintained for a minimum of 10 years.

What was changed by this legislation

Various documents require acknowledgment under oath before a notary public for legal effect, including documents used in standard business transactions, such as deeds, mortgages, trust deeds, powers of attorney, affidavits, and protests of commercial paper, to name a few. This legislation does not apply to wills, because they are witnessed and attested to, not notarized.

Before the enactment of HB 4212A, a notary public and the document signer were required to be in each other's physical presence with the document for the acknowledgment to be lawful under ORS Chapter 194.

Remote online notarization, sometimes called e-notarization, changed the physical presence requirement of ORS 194.235 to allow notarization of documents in some instances when the notary and the signer are not in the physical presence of each other, and to allow identification of the signer to be proved by knowledge-based authentication (KBA). However, hooking up the smartphone for a "video chat" between a notary and the signing individual is not sufficient to allow the notary to notarize a document outside the notary's physical presence.

Differences From Traditional Notarization

RON is different from traditional notarization, which requires the notary and signer to be in each other's physical presence, a "wet" signature on paper documents, and the authentication of the identity of the signer through physical, government-issued identity documents.

Continued on page 9

RON is also different from electronic notarization, sometimes called iPEN, which allows a signer to use an electronic signature on a document that is affixed to the document in the physical presence of an Oregon-registered notary public through the use of an electronic software platform. RON is similar in its use of electronic signatures, but allows use of different software platforms and methodology.

RON allows identity proofing of the signer through the use of KBA to meet the requirements of ORS 194.240. Before the enactment of HB 4212A, a notary either had to have personal knowledge of the identity of the signer, or the signer was required to produce an acceptable government-issued identification document.

Geographical Factor

The Oregon-registered notary must be able to identify the location of the remotely located individual and the use of the record to be notarized. If the remote signer is located outside the United States, Puerto Rico, the US Virgin Islands, or any US territory or insular possession, the record to be notarized must be intended to be filed or relate to a matter before a public official, court, or governmental official—or relate to property or a property transaction of property located in or substantially related to US territorial jurisdiction. Additionally, the notarial act is not prohibited by the law where the remotely located individual is signing. The sanction is not set forth in the legislation, but it is presumed to offer cause for the notary public to decline to notarize the document.

Certification

The certifications in the legislation require that a document notarized must bear a certificate that identifies that the document was notarized involving the use of communication technology.

Further, the legislation provides that the notary may certify that a tangible copy of an electronic record is an accurate copy of the electronic record. If so certified, a county clerk may accept such a document for recording.

In addition, the legislation provides that the notary official stamp is an official notarial seal for all purposes. This was added to settle the question of whether there must be an embossed seal, ink stamp, or an electronic stamp to be effective. If approved by the Oregon Secretary of State, the notary stamp is sufficient.

Implementation

The legislation directs that the Oregon Secretary of State promulgate rules and standards for implementation. At the time of the passage of the legislation, the Oregon Secretary of State had already promulgated rules and standards for compliance.

Qualified vendors of the RON software platforms are identified on the Oregon Secretary of State website , although there is no similar list of Oregon notaries who have completed the required training and certification to provide RON notarization. Upon telephone or email request—(503) 986-2200 or Corporation.division@oregon.gov—the Oregon Corporation Division will confirm whether a specific notary public can perform RON.

The legislation provides that an Oregon authorized notary can charge up to $25 per notarial act for a RON notarization, while a standard notarial act is limited to $10 per notarial act. A notary in another state—if RON is authorized in that state and the notary public is authorized to perform RON—is authorized to perform RON for an Oregon-located individual.

The legislation does contain a curative provision for documents notarized using RON during this interim period, if new legislation is not passed to delete the sunset provision. This means that a document notarized remotely and recorded will still be validly notarized, even if RON is not extended permanently. While I cannot speak for the Oregon Law Commission's actions in the future, it has stated its intent to propose an amendment to delete the sunset provision in the 2021 legislative session. It is a "brave new world," so business may be able to progress, even in this COVID-19 world. Be safe. ◆

Section News

Save the Date

OSB Business Law Section
2020 Annual CLE Program
and Meeting
November 5-6, 2020

Please mark your calendars for the upcoming Business Law Section's annual CLE program, which will take place **online** on the afternoon of Thursday, November 5 and the morning of Friday, November 6.

Planned topics include:

- Representation and Warranty Insurance and Business Interruption Insurance
- New Digital World: Working Remotely
- Acquisition of Distressed Business Assets/Restructuring and Bankruptcy Options

Ethics credit will also be available.

The Section's **annual meeting** will take place during this event.

Full program information will be coming soon!

Law-school Scholarships to be Awarded by the Section

The New Business Lawyers Subcommittee is currently assisting the Executive Committee by reviewing law students' scholarship applications for the 2020/2021 academic year. The Business Law Section will award a $1,000 scholarship to a law student at each of the three law schools in Oregon at the Section's annual meeting.

CLE Programs

Corporate Activity Tax
Wednesday, September 23, 2020 /12:00–1:15 PM
OSB Zoom meeting
Sponsored by the Taxation Section
Click to register

Buying, Selling and Exchanging Partnership and LLC Interests
Tuesday, Srptember 29, 2020/10:00–11:00 AM
OSB Audio Webcast
Click to register

Purchase and Sale of Businesses
Thursday, October 8, 2020/1200.–1:00 PM
MBA Zoom Meeting
Click to register

Public Contracting Issues, Federal and State
Friday, October 9, 2020/8:00 AM.–5:00 PM
OSB Zoom Meeting
Sponsored by the Construction Law Section.
Click to Register

Securities
Thursday, October 15, 2020,/12:00–1:00 PM
MBA Zoom Meeting
Click to register

Ethical Considerations of Closely Held Businesses
Thursday, October 22, 2020,/12:00–1:00 PM
MBA Zoom Meeting
Click to register

Business Law Section CLE Program
November 5-6, 2020
More information in *Section News*

Coping With U.S. Export Controls and Sanctions 2020
Thursday, December 10, 2020,/5:30 AM–2:00 PM
PLI Live Webinar
Information & registration

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business-law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

Articles in this newsletter are for informational purposes only, and not for the purpose of providing legal advice. The opinions expressed in this newsletter are the opinions of the individual authors and may not reflect the opinions of the Oregon State Bar Business Law Section or any attorney other than the author.
Comments can be sent to the editor at carole424@aol.com.